

STATE BAR COURT OF CALIFORNIA  
HEARING DEPARTMENT – SAN FRANCISCO

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| In the Matter of                  | ) | Case No. <b>10-PM-04851-LMA</b>   |
|                                   | ) |                                   |
| <b>LEWIS NATHANIEL NELSON,</b>    | ) |                                   |
|                                   | ) | <b>ORDER RE</b>                   |
| <b>Member No. 87954,</b>          | ) | <b>MOTION TO REVOKE PROBATION</b> |
|                                   | ) |                                   |
| <u>A Member of the State Bar.</u> | ) |                                   |

**I. Introduction**

In this probation revocation proceeding, respondent **Lewis Nathaniel Nelson** is charged with violating his probation conditions imposed by the California Supreme Court. The Office of Probation of the State Bar of California (Office of Probation) seeks to revoke his probation, to impose upon respondent the entire period of suspension previously stayed, and to involuntarily enroll respondent as an inactive member of the State Bar.

Respondent opposes the motion, arguing that a period of two-year actual suspension would be unduly harsh for his probation violations.

The court finds, by preponderance of the evidence, that respondent has violated his probation conditions and hereby grants the motion in part and denies it in part. The court recommends, among other things, that respondent's probation be revoked, that the previously stayed, two-year suspension be lifted, that he be suspended for two years, that execution of the

suspension be stayed, that he be placed on probation for two years on conditions and that he be actually suspended for six months and until he makes restitution.

## **II. Pertinent Procedural History**

On May 13, 2010, the Office of Probation filed and properly served a motion to revoke probation on respondent. Respondent, representing himself, filed a response on June 7, 2010.

## **III. Findings of Fact and Conclusions of Law**

The following findings of fact are based on declarations and documentary evidence submitted. Respondent's declaration was made under penalty of perjury under the laws of the State of California. Accordingly, the court finds his declaration to be credible.

### **A. Jurisdiction**

Respondent was admitted to the practice of law in California on November 29, 1979, and has since been a member of the State Bar of California.

### **B. Probation Conditions in Supreme Court Case No. S175517**

On October 14, 2009, in Supreme Court case No. S175517, the California Supreme Court ordered, among other things, that:

1. Respondent be suspended from the practice of law for two years, that execution of the suspension be stayed, that he be placed on probation for two years, and that he be actually suspended for 90 days, as recommended by the Hearing Department of the State Bar Court in its order approving stipulation filed May 14, 2009 (State Bar Court case No. 07-O-14750); and
2. Respondent comply with certain probation conditions, including, but not limited to:

- a. Within 30 days from the effective date of discipline (by December 13, 2009), he must contact the Office of Probation and schedule a meeting with his assigned probation deputy to discuss the probation conditions;
- b. Submit quarterly reports to the Office of Probation on each January 10, April 10, July 10 and October 10 of the period of probation; and
- c. Provide proof of satisfaction of all sanctions imposed by the Alameda County Superior Court in case number RG06249724 within 90 days of the effective date of discipline (by February 11, 2010).

Notice of this order was properly served upon respondent in the manner prescribed by California Rules of Court, rule 8.532(a), at respondent's official address in accordance with Business and Professions Code section 6002.1.<sup>1</sup>

**C. The Office of Probation, Quarterly Reports and Restitution**

On November 13, 2009, probation deputy Charles C. Bagai of the Office of Probation sent a letter to respondent outlining the terms and conditions of his probation. Respondent received the letter.

On December 11, 2009, respondent contacted the Office of Probation to schedule a meeting to discuss the terms of his probation. Because Bagai did not answer the telephone, respondent left a telephone message indicating that he was available to meet and confer on December 16, 2009. Respondent did not receive a return phone call from Bagai. The meet and confer never took place.

On January 12, 2010, respondent filed his January 10 quarterly report, stating that he had made partial payment of the sanctions imposed by the Alameda County Superior Court and that

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<sup>1</sup>References to sections are to the provisions of the Business and Professions Code.

he had not yet received a copy of the canceled check as the payment was only recently made. He attached a copy of the front of a check in the amount of \$100 dated December 31, 2009.

On March 29, 2010, the Office of Probation again sent respondent a letter reminding him of the terms and conditions of his probation. Bagai also advised him that he was to complete payment of all sanctions by February 11, 2010, and that he must submit the required proof of payment immediately.

On April 12, 2010, respondent filed his April 10 quarterly report, stating that he had made partial payment of the sanctions imposed by the Alameda County Superior Court, that a copy of the partial payment was enclosed, that he could not pay the entire sanctions due to lack of income from his inability to practice, and that he was filing a motion for relief. He also submitted proof of payment of the check dated December 31, 2009, and a copy of a second check in the amount of \$100 dated March 31, 2010.

#### **D. Respondent's Arguments**

In his declaration in response to the motion to revoke his probation, respondent admitted that he was untimely in filing the quarterly reports and in making the financial restitution. But he reasoned that his failure to pay all the sanctions was due to his difficult financial condition and medical reasons.

But, absent any financial statement or motion to modify his probation conditions based on financial hardship, his reference to his financial situation is not clear and convincing evidence to demonstrate financial difficulty. Thus, his argument of financial difficulty is rejected.

#### **E. Conclusions of Law**

Section 6093, subdivision (b), provides that violation of a probation condition constitutes cause for revocation of any probation then pending and may constitute cause for discipline. Section 6093, subdivision (c), provides that the standard of proof is the preponderance of the

evidence. Bad faith is not a requirement for a finding of culpability in a probation violation matter. Instead, a general purpose or willingness to commit an act or permit an omission is sufficient. (*In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 536.)

Respondent admitted that he violated his probation conditions by failing to do the following:

1. Timely submit two quarterly reports (January 10, 2010 and April 10, 2010 – both were late by two days); and
2. Provide proof of satisfaction of all sanctions imposed by the Alameda County Superior Court in case number RG06249724 by February 11, 2010 (\$200 of the \$1,910 sanctions were paid).

Therefore, by a preponderance of the evidence, respondent willfully violated the probation conditions ordered by the Supreme Court in its October 14, 2009 order.

As a result, the revocation of respondent's probation in California Supreme Court case No. S175517 is warranted.

#### **IV. Mitigating and Aggravating Circumstances**

The parties bear the burden of proving mitigating and aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e).)<sup>2</sup>

##### **A. Mitigation**

Financial difficulties may be considered in mitigation if they are extreme and result from circumstances that are not reasonably foreseeable or that are beyond the attorney's control. (*In re Naney* (1990) 51 Cal.3d 186, 196-197.) Respondent's financial distress is not sufficiently

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<sup>2</sup>All further references to standards are to this source.

supported by clear and convincing evidence or shown to be unforeseeable. Thus, it is not considered as mitigation. (Std. 1.2(e)(iv).)

## **B. Aggravation**

In aggravation, respondent has two prior records of discipline. (Std. 1.2(b)(i).)

1. Effective October 3, 2007, respondent was privately reproved for failing to return client file and failing to render an appropriate accounting. (State Bar Court case No. 06-O-15116.)

2. In the underlying matter, effective November 13, 2009, respondent was ordered suspended for two years, stayed, and placed on probation for two years with an actual suspension of 90 days for his professional misconduct in one client matter – failing to perform services competently, failing to obey court orders, failing to communicate with client, withdrawing from employment without court permission and without advising his client, and failing to return client file. (Supreme Court case No. S175517; State Bar Court case No. 07-O-14750.)

Respondent committed multiple acts of wrongdoing, including failing to timely submit two reports due January 10 and April 10, 2010, and failing to complete restitution. (Std. 1.2(b)(ii).)

## **V. Discussion**

Public protection and attorney rehabilitation are the primary goals of disciplinary probation. (*In the Matter of Howard* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 445, 452.)

“[T]here has been a wide range of discipline imposed for probation violations from merely extending probation ... to a revocation of the full amount of the stayed suspension and imposition of that amount as an actual suspension.” (*In the Matter of Gorman* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 567, 573.)

In determining the level of discipline to be imposed, the court must consider the “total length of stayed suspension which could be imposed as an actual suspension and the total amount of actual suspension earlier imposed as a condition of the discipline at the time probation was granted.” (*In the Matter of Potack, supra*, 1 Cal. State Bar Ct. Rptr. 525, 540.) The extent of the discipline is dependent, in part, on the nature of the probation violation and its relationship to respondent’s prior misconduct. (*Ibid.*)

A probation “reporting requirement permits the State Bar to monitor [an attorney probationer’s] compliance with professional standards.” (*In the Matter of Wiener* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 759, 763, citing *Ritter v. State Bar* (1985) 40 Cal.3d 595, 605.) In addition, “an attorney probationer’s filing of quarterly probation reports is an important step towards the attorney’s rehabilitation.” (*Id.* at p. 763.)

The State Bar contends that respondent’s probation should be revoked because his probation violations demonstrate a lack of concern about professional responsibilities and that the full amount of stayed suspension of two years should be imposed for respondent’s rehabilitation.

Respondent, on the other hand, argues that he had filed the quarterly reports, albeit late, and that he did not have the funds to pay all of the court sanctions due to health issues and excusable neglect and mistake. He thus argues that a two-year actual suspension would be grossly disproportionate to his misconduct and presents an undue hardship.

While he may be facing financial challenges, his living circumstances or earning ability was not the cause of his tardiness to file the quarterly reports, albeit two days late. Absent compelling mitigating circumstances, an attorney who willfully violates a significant condition of probation can anticipate actual suspension as the expected result. (*In the Matter of Gorman, supra*, 4 Cal. State Bar Ct. Rptr. at p. 574.)

In *In the Matter of Taggart* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 302, the attorney was suspended for six months and until he completed restitution for failing to comply with his probation condition of making restitution payment of \$1,528 coupled with his failure to make reasonable efforts to acquire the resources to pay or to make other good faith efforts to satisfy the restitution obligation. Like respondent, he had two prior records of discipline.

Here, respondent failed to pay the court sanctions and timely file the quarterly reports. The Supreme Court has held that the "significance of restitution is its probative value as an indicator of rehabilitation, not the repayment of the underlying indebtedness." (*Hippard v. State Bar* (1989) 49 Cal.3d 1084, 1093.) Requiring restitution serves the rehabilitative and public protection goals of disciplinary probation by forcing attorneys to confront in concrete terms the consequences of the attorney's misconduct. (*In the Matter of Taggart, supra*, 4 Cal. State Bar Ct. Rptr. 302, 312.) Although respondent asserted financial hardship, he did not seek a modification of the restitution condition of probation.

Nevertheless, in this matter, the court does not believe that imposing the entire period of stayed suspension is necessary to achieve the goals of attorney disciplinary probation. The State Bar's recommendation that respondent's probation be revoked without further conditions is inadequate to impress upon him the importance of strict compliance with probation conditions as an integral step toward rehabilitation, and that he be actually suspended for two years, the entire original period of stayed suspension, is excessive and not necessary.

Therefore, the court finds good cause for granting the State Bar's motion to revoke respondent's probation and concludes that part of the period of the stayed suspension be imposed. Balancing all relevant facts and circumstances to reach the appropriate recommendation of degree of discipline, the court finds that a six-month actual suspension and



until he makes restitution with a two-year probation would be sufficient to achieve the goals of attorney disciplinary probation.

The State Bar further recommends that respondent be placed on involuntary inactive status under section 6007, subdivision (d), for failing to comply with the terms of his disciplinary probation. However, it is possible that if respondent was placed on involuntary inactive status, by the time the Supreme Court order imposing discipline in this matter became effective, respondent would have been precluded from practicing law for a longer period than the recommended discipline. Therefore, based on the short period of actual suspension recommended, the court denies the State Bar's request to enroll respondent involuntarily inactive under section 6007, subdivision (d).

Since respondent completed the State Bar Ethics School in August 2008, it is not recommended that he be required to take the course again in this matter. (Rules Proc. of State Bar, rule 290.)

## **VI. Recommendations**

Accordingly, the court recommends as follows:

### **A. Discipline**

The court recommends that the probation of respondent, **Lewis Nathaniel Nelson**, previously ordered in Supreme Court Case No. S175517 (State Bar Court case No. 07-O-14750) be revoked, that the stay of the execution of the two-year suspension be lifted, that respondent be suspended from the practice of law in California for two years, that execution of the suspension be stayed, and that respondent be placed on probation for two years on the following conditions:

1. Respondent must be suspended from the practice of law for a minimum of the first six months of probation, and he will remain suspended until the following requirements are satisfied:

- a. He must make restitution to Fire Insurance Exchange for the discovery sanctions imposed by the Alameda County Superior Court in *Montgomery v. Witt et al.*, case number RG06249724 against respondent in a total amount of \$1,910 (\$410 + \$500 + \$1,000)<sup>3</sup> (or reimburse the Client Security Fund, to the extent of any payment from the fund to Fire Insurance Exchange, in accordance with Business and Professions Code section 6140.5) and furnish satisfactory proof to the State Bar's Office of Probation in Los Angeles;
- b. If he remains suspended for two years or more as a result of not satisfying the preceding condition, he must also provide proof to the State Bar Court of his rehabilitation, fitness to practice, and learning and ability in the general law before his suspension will be terminated pursuant to standard 1.4(c)(ii).

Any restitution owed to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d);

2. Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all the conditions of this probation;
3. Respondent must maintain, with the State Bar's Membership Records Office *and* the State Bar's Office of Probation, his current office address and telephone number or, *if no office is maintained*, an address to be used for State Bar purposes.  
(Bus. & Prof. Code, § 6002.1, subd. (a).) Respondent must also maintain, with

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<sup>3</sup> Based on the May 14, 2009 stipulation, the client was ordered to pay the discovery sanctions of \$205 and not respondent and the stipulated conclusions of law noted that respondent failed to pay the sanctions of \$410, \$500 and \$1,000 (Page 10 of the stipulation). Therefore, respondent must pay the discovery sanctions of \$410, \$500 and \$1,000, but not the \$205. According to the Office of Probation, respondent had already paid \$200 and thus, he should be credited for the amount paid.

the State Bar's Membership Records Office *and* the State Bar's Office of Probation, his current home address and telephone number. (See Bus. & Prof. Code, § 6002.1, subd. (a)(5).) Respondent's home address and telephone number will *not* be made available to the general public. (Bus. & Prof. Code, § 6002.1, subd. (d).) Respondent must notify the Membership Records Office and the Office of Probation of any change in any of this information no later than 10 days after the change;

4. Respondent must report, in writing, to the State Bar's Office of Probation no later than January 10, April 10, July 10 and October 10 of each year or part thereof in which respondent is on probation (reporting dates). However, if respondent's probation begins less than 30 days before a reporting date, respondent may submit the first report no later than the second reporting date after the beginning of his probation. In each report, respondent must state that it covers the preceding calendar quarter or applicable portion thereof and certify by affidavit or under penalty of perjury under the laws of the State of California as follows:
  - a. In the first report, whether respondent has complied with all the provisions of the State Bar Act, the Rules of Professional Conduct, and all other conditions of probation since the beginning of probation; and
  - b. In each subsequent report, whether respondent has complied with all the provisions of the State Bar Act, the Rules of Professional Conduct, and all other conditions of probation during that period.

During the last 20 days of this probation, respondent must submit a final report covering any period of probation remaining after and not covered by the last quarterly report required under this probation condition. In this final report,

respondent must certify to the matters set forth in subparagraph (b) of this probation condition by affidavit or under penalty of perjury under the laws of the State of California;

5. Subject to the proper or good faith assertion of any applicable privilege, respondent must fully, promptly, and truthfully answer any inquiries of the State Bar's Office of Probation that are directed to respondent, whether orally or in writing, relating to whether respondent is complying or has complied with the conditions of this probation;
6. Respondent's probation will commence on the effective date of the Supreme Court order imposing discipline in this matter; and
7. At the expiration of the period of this probation, if respondent has complied with all the terms of probation, the order of the Supreme Court suspending respondent from the practice of law for two years that is stayed will be satisfied and that suspension must be terminated.

**B. Multistate Professional Responsibility Exam**

It is not recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination since he had previously taken and passed the MPRE on August 21, 2008 (Page 12 of the May 14, 2009 Stipulation).

**C. California Rules of Court, Rule 9.20**

It is also recommended that the Supreme Court order respondent to comply with California Rules of Court, rule 9.20, paragraphs (a) and (c), within 30 and 40 days, respectively, of the effective date of its order imposing discipline in this matter. Willful failure to do so may

result in revocation of probation, suspension, disbarment, denial of reinstatement, conviction of contempt, or criminal conviction.<sup>4</sup>

**D. Costs**

The court recommends that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Dated: June\_\_\_\_, 2010

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**LUCY ARMENDARIZ**  
Judge of the State Bar Court

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<sup>4</sup> Respondent is required to file a rule 9.20(c) affidavit even if he has no clients to notify. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)